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Complainant (Stillwater)

v.

Respondent (Bangor)

I. COMPLAINANT'S CHARGE:

Complainant, alleges that Respondents terminated her employment because of her sex (pregnancy).

II. RESPONDENTS' ANSWER:

Respondents denied knowing that Complainant was pregnant and said that she was terminated for tardiness, absenteeism, and lack of focus.

III. JURISDICTIONAL DATA:

- 1) Date of alleged discrimination: June 25, 2008.
- 2) Date complaint filed with the Maine Human Rights Commission: August 19, 2008, amended to add individual Respondents December 19, 2008.
- 3) Respondent employs about 50 employees and is subject to the Maine Human Rights Act, Title VII of the Civil Rights Act of 1964, as well as state and federal employment regulations.
- 4) Complainant is represented by Christiana E. Mann, Esq. Respondent is represented by Anne-Marie Storey, Esq.
- 5) Investigative methods used: Review of the written materials provided by the parties, fact finding conference.

IV. DEVELOPMENT OF FACTS:

1) The parties and issues in this case are as follows:

- a) The Complainant, is female. She was hired on about August 15, 2007 to be a crew member at the Respondent in Old Town, Maine. Complainant became pregnant at the end of May 2008. She was terminated on June 25, 2008.
- b) Respondent, was the owner/operator of [] of Old Town.¹
- c) On June 25, 2008, after consulting with Respondent, Respondent terminated Complainant's employment. Respondents stated that she was terminated for tardiness, absenteeism, and lack of focus. Complainant stated that the real reason she was terminated is her pregnancy.

2) Complainant provided the following concerning her employment with Respondents:

- a) She was most often assigned to prepare soup and sandwiches and was, to some extent, cross trained for other positions. She was often praised for her work. A representative of the franchisor, Respondent, was in the restaurant one day, working with the crew, and he commented that he had never seen someone stay so calm and pop out sandwiches like she did.
- b) Not long before she was terminated, five weeks or so, Mr. Respondent said he did not know what they would do without her because she was so good at preparing sandwiches.
- c) She never left the Respondents short-handed. She always came in when they called her to see if she could cover a shift. She worked many doubles. She did not want to work overnights but she did so frequently toward the end of her employment.
- d) She was counseled for being late at times. She was counseled once for not having the hem of her pants sewn correctly. Other employees had tardiness and absence issues that were the same or worse than hers. For example, the Assistant Manager (male) was late nearly every day, for up to an hour and a half. She was held to task for being late but he wasn't.
- e) She received a performance evaluation on May 14, 2008 in which she was rated "meets expectations." Ms. Respondent wrote, "Much improved on call outs & lateness – this is much appreciated," and gave her the highest rating for "Always clean & neat & tidy in proper uniform." She received a raise from \$7.75 to \$7.85 per hour.

¹ Although another legal entity owned by the Respondent, is listed on the Secretary of State's website as doing business as Respondent has no actual ownership interest in or control over the Respondent restaurant in Old Town, which is owned and operated exclusively Respondent.

- f) She was working an overnight shift (10pm to 6am) on June 2, 2008. At about 2am, she developed bad cramps when she lifted the ice coffee dispenser. She had a previous miscarriage and this is what it felt like. She called a co-worker, Mr. T, and told him she needed to leave work. He came in earlier than his scheduled shift and she left. She went to the hospital, got checked, and was told she was pregnant.
 - g) The next morning, she called and told Ms. Respondent that she was pregnant. She told co-workers that she was pregnant. Mr. Respondent knew she was pregnant, too.
 - h) She developed morning sickness and would have to leave her work station suddenly to go out back and throw up. Mr. Respondent spoke to her a couple of times about being sure that someone was covering for her when she left her station. The Respondents were irritated at her when she had to leave her station to throw up.
 - i) On Tuesday, June 24, 2008, she was working a 6am to 2pm shift. She had to run to the bathroom several times that morning and by 11am was too sick to stay at work. A co-worker who was scheduled to leave at 11am agreed to stay until 2pm so that Complainant could go home. Complainant told Ms. Respondent that she was throwing up and needed to leave. Ms. Respondent gave her permission to go.
 - j) On Wednesday, June 25, 2008, she arrived at work at about 6am, put on a hair net and visor and checked in. She looked at the schedule and saw that her name was crossed off for that day and for the rest of the week. She asked a co-worker what was going on by the co-worker didn't know. Mr. and Ms. Respondent weren't there. She left.
 - k) She returned to work later that day, at about 2pm, to pick up her paycheck. Mr. Respondent came out front to give her the check. He told her that Ms. Respondent was "sick of everything" and that she (Complainant) was terminated.
 - l) She applied for Medicaid after she was fired so that she could get pre-natal care. Her mother dropped off some paperwork at Respondent that needed to be completed by her former employer. The Respondents refused to complete the paperwork for her.
- 3) The Respondents provided the following concerning Complainant's employment and termination:
- a) (Mr. Respondent) He didn't know that Complainant was pregnant.
 - b) (Ms. Respondent) Complainant never told her directly that she was pregnant. She heard rumors that Complainant was pregnant but she doesn't pay attention to rumors.

- c) (Mr. Respondent) Complainant did leave her station to use the bathroom. They knew she was throwing up in there. She was very good about letting them know she had to leave her station and they made sure to cover for her. They didn't know why. They suspected that she was hung over from drinking or doing drugs.
 - d) (Mr. Respondent) He had a performance discussion with Complainant on April 17, 2008 about tardiness and call outs. She explained that she had some mechanical problems with her car, but her car was fixed and she still came in late a couple of times a week. He told her she needed to be on time and wanted her to be successful.
 - e) Mr. Respondent submitted to the Commission a Performance Discussion note that is dated April 17, 2008. He admitted that he did not write the note on the same day he had the discussion with Complainant. He stated that he wrote it on May 15, 2008, the day he wrote a second Performance Discussion note. Both of these notes were stapled to a letter Mr. Respondent wrote on July 14, 2008 to the Department of Labor in response to Complainant's unemployment claim. Mr. Respondent denied writing the Performance Discussion notes for the purpose of responding to the unemployment claim.
 - f) Mr. Respondent He does not remember what he said to Complainant when she came to pick up her last paycheck.
 - g) Regarding Complainant's complaint that Respondents refused to complete paperwork that she needed to obtain prenatal care, Mr. Respondent said that he did not have any obligation to fill out paperwork or do anything else for an ex-employee. Ms. Respondent wrote (July 8, 2008) that she had the paperwork for a week but did not have time to fill it out.
- 4) Other information and documents submitted:
- a) Respondents have never hired anyone they knew to be pregnant.
 - b) Absenteeism: At the Fact Finding Conference, Mr. Respondent stated that Complainant called out three times in the three months prior to termination (April 24 to June 24, 2008). Time records submitted after the Fact Finding Conference showed that May 20, 2008 was the only date during that time period that Complainant called out. Mr. Respondent retracted his prior statement and said that the call outs happened over a longer prior of time.

A male employee (T) was absent twice during one week in April 2008 and was not disciplined or terminated. On April 7, 2008, he passed out while working and was taken to the Emergency Room. On April 12, 2008, he called in because he was not feeling well.

- c) Tardiness: Respondents records appear to show that Complainant was often tardy. The records also show that she often stayed late and covered shifts for other employees.
- d) Dress code:
 - 1. On May 14, 2008, Respondents rated Complainant "3" out of "3" for maintaining a neat, clean and professional appearance. (Performance Evaluation, see file.)
 - 2. Respondent's submitted a Performance Discussion Note dated May 15, 2008, signed by Mr. Respondent, which reads: "Pants not hemmed. Shirt wrinkled." "I have talked to you multiple times about pants not hemmed. Not (sic) pants are frayed and worn This looked sloppy." (Performance Discussion Note, see file.)
 - 3. Ms. Respondent stated that on June 6, 2008, she spoke to Complainant about "repeated" violation of the dress code by refusing to hem her pants. She does not claim to have counseled Complainant for any other aspect of her job performance.
 - 4. Respondents also say that June 2 and June 4, shortly before the day that Ms. Respondent spoke to Complainant about refusing to hem her pants, Complainant left work early without permission and with no one to cover for her.
- e) Not focusing and doing the job: Mr. Respondent gave this as a reason for terminating Complainant. He said that Complainant had a personal relationship with the Assistant Manager NA, which wasn't appropriate, and that she took advantage of it by calling out. Mr. Respondent said that Assistant Manager NA was terminated on about May 18, 2008 because of his relationship with Complainant.
- f) Respondent's final submission, received September 11, 2009, reads in part:
"Complainant's employment was terminated after meeting with Respondent to discuss the ongoing [attendance] problem, during which Complainant showed no inclination to accept responsibility or improve behavior." There was no testimony at the Fact Finding Conference regarding any such meeting.
- g) The Respondents provided these responses when asked about their progressive discipline policy: (1) They follow a consistent policy, (2) every case is different, (3) they're not as consistent as they need to be; they discuss things with employees but don't always write it down.

V. ANALYSIS:

- 1) The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. §

4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

- 2) The Maine Human Rights Act (MHRA) provides, in part, that it is unlawful employment discrimination to discharge an employee because of sex. 5 M.R.S.A. § 4572(1)(A). For the purpose of the MHRA, the word "sex" includes pregnancy and medical conditions which result from pregnancy. 5 M.R.S.A. §4572-A(1).
- 3) Here, Complainant, alleges that Respondents, terminated her because of her sex (pregnancy). Respondents allege that Complainant was terminated due to tardiness, absenteeism, and lack of focus.
- 4) Because there is no direct evidence of discrimination, the analysis of this case will proceed utilizing the burden-shifting framework following *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). See *Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1263 (Me. 1979).
- 5) First, Complainant establishes a prima-facie case of unlawful discrimination by showing that: (1) she belonged to a protected class, (2) she performed her job satisfactorily, (3) her employer took an adverse employment decision against her, and (4) her employer continued to have her duties performed by a comparably qualified person or had a continuing need for the work to be performed. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000); *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990); cf. *City of Auburn*, 408 A.2d at 1261.
- 6) Once Complainant has established a prima-facie case, Respondent must (to avoid liability) articulate a legitimate, nondiscriminatory reason for the adverse job action. See *Doyle v. Department of Human Services*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54; *City of Auburn*, 408 A.2d at 1262. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse employment action. See *id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. See *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68.
- 7) Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the employer's articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the employment decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.

- 8) In order to prevail, Complainant must show that she would not have suffered the adverse job action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See City of Auburn*, 408 A.2d at 1268.
- 9) Here, Complainant established a prima facie case of sex discrimination in that (1) she was a pregnant female, (2) her most recent performance evaluation was satisfactory, (3) she was terminated, and (4) Respondents had an ongoing need for crew members.
- 10) Respondents denied knowing that Complainant was pregnant, and articulated legitimate, non-discriminatory reasons for terminating Complainant, namely, tardiness, absenteeism, and lack of focus.
- 11) At the final stage of analysis, Respondents reasons were found to be pretextual, with reasoning as follows:
 - a) First: It is not plausible that Respondents did not know that Complainant was pregnant. She testified that she told Ms. Respondent about her pregnancy on June 3, 2008, one day after she had to leave work early with cramps, and that she also told co-workers about her pregnancy. It is undisputed that Complainant had morning sickness and would have to leave her work station suddenly to throw up. It is simply not plausible that the Respondents would not have known that she was pregnant. The Respondents' claim that they thought Complainant was hung over or on drugs is absurd. If they thought she was impaired by drugs or alcohol at work, one would think that Respondents would have confronted her about it.
 - b) Second: There is evidence that the Respondents created documents after the fact to justify terminating Complainant. Mr. Respondent admitted that he did not write the Performance Discussion notes dated April 17, 2008 on that date. As for the Performance Discussion note dated May 15, 2008, it is simply not plausible that Respondents would have reprimanded Complainant for dress code violations the very day after they gave her the highest rating possible for appearance on her performance evaluation. The Respondents' willingness to manufacture documents creates doubt about the accuracy of their other documents (calendars, time records, etc.).
 - h) Third: Mr. Respondent testified at the Fact Finding Conference that Complainant was terminated, in part, because she was absent three times in a three month period. When time records proved him wrong, Mr. Respondent retracted his claim and asserted that his statement was based on a longer period of time. Shifting testimony about the reason for termination is evidence that the stated reason is untrue and that the Respondents are trying to hide the real reason for Complainant's termination.
 - c) Fourth: Respondents claimed that they follow a consistent progressive discipline policy, then acknowledged that, in fact, they don't and that "every case is different." This helps

explains why a male employee, "T", was absent twice in one week without any discipline, while Complainant was absent once in a three month period, yet was terminated. Arbitrary treatment often masks favoritism toward some and unlawful discrimination toward others.

- d) Fifth: There is no support whatsoever for Mr. Respondent's claim that Complainant's termination had anything to do with her alleged relationship with Assistant Manager NA. If Complainant was, as he claims, taking advantage of her relationship with NA by calling out on scheduled shifts, that behavior would have come to a stop on May 18, 2008 when NA was terminated.
- e) Sixth: Timing supports Complainant's claim of pregnancy discrimination. She was employed since August 2007. She received fully satisfactory performance evaluations, most recently on May 14, 2008. She notified Respondents that she was pregnant on June 3, 2008 and was terminated on June 25, 2008. The short time period between Complainant's pregnancy and her termination is powerful evidence of unlawful discrimination.

VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that the Respondents, discriminated against Complainant, by terminating her because of her sex (pregnancy); and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).

Patricia E. Ryan, Executive Director

Barbara Lelli, Chief Investigator